DOCUMENT RESUME

ED 251 023 HE 017 886

AUTHOR Gray, John Andrew
TITLE Case Comment: N.L.R.B. v. Yeshiva University--A Test for Determining "Managerial Employees".
PUB DATE Mar 80
NOTE 20p.
PUB TYPE Legal/Legislative/Regulatory Materials (090) -- Viewpoints (120)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS *Administrator Role; *College Faculty; Court Litigation; *Faculty College Relationship; *Governance; Higher Education; *Private Colleges; *Teacher Role
IDENTIFIERS *National Labor Relations Board v Yeshiva Univ

ABSTRACT

The Supreme Court decision in National Labor Relations Board (NLRB) v. Yeshiva University is discussed, along with a test for determining "managerial employees." In this case, the court held that full-time faculty at nonprofit, private, higher education institutions are managerial employees, where their recommendations are normally determinative of curricular matters. The NLRB's contentions concerned: the professional status of full-time faculty; the exercise of faculty's supervisory and managerial functions on a collective rather than individual basis; actions of the faculty that are not in the interest of the employer; and the ultimate authority of the Board of Trustees over the faculty. The majority opinion of the court was that faculty members act simultaneously both as individual professionals and as managerial employees. The subject matter of their collective decisions is managerial. Their authority in academic matters is absolute, including courses that are offered and class scheduling. The minority opinion advised that one must not overvalue the significance of the faculty's influence on academic affairs. The faculty's role in the governance of higher education is unique, and the faculty's curricular recommendations are made on the basis of its independent professional judgment. (SW)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

John Anderson

Mary

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

ED251023

CASE COMMENT: N.L.R.B. v. Yeshiva University--

A Test for Determining "Managerial Employees"

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

This document has been reproduced as received from the person or organization originating it.
Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

> Inflation, threats of entrenchment, and the prospect of collective bargaining legislation in several states have stimulated a new surge of interest in collective bargaining by college and university faculty. Each year, according to studies of faculty opinion, a larger percentage of the profession regards collective bargaining as an acceptable method of contending successfully with threats to shared authority, tenure, academic freedom, due process, and compensation.
>
> At present it is estimated that one third of full-time faculty members are organized formally for the purposes of collective bargaining.
>
> As the economic crisis deepens, as the pool of high school graduates decreases, and as public doubt about the worth of the baccalaureate degree increases, faculty members can increasingly be expected to work collectively for solutions to their common problems.[1]

Whatever the collective bargaining expectations of college and university faculty, the Supreme Court of the United States (5-4 decision) in NLRB v. Yeshiva University (48 LW 4175, Feb. 20, 1980) effectively removed an essential condition[2] for unionization of college faculty, viz. the statutory right under the NLRA to organize for purposes of collective bargaining and to compel one's employee to bargain in good faith over "wages, hours, and other terms and conditions of employment."

In Yeshiva, the Supreme Court held that full time faculty at private, non-

---

1"Report of Committee A on Representation of Economic and Professional Interests: 1978-79," Academe (AAUP), October, 1979, p. 410. For a general overview of the history of collective bargaining in higher education and of the relevant federal and state laws and issues, see Kaplan, op. cit., pp 95-107; Hollander, op. cit., pp 137-152; and Carr, Robert K., and VanEyck, Daniel K., Collective Bargaining Comes to The Campus, American Council on Education, Washington, D.C., 1973. At present, 244 four-year colleges have faculty unions (168 at public institutions and 76 at private). (Information from unpublished AJCU Higher Education Report, Sept., 1979)

2"...when the applicable law does not establish a right to collective bargaining for such a professional work force as a college faculty, an essential

HE 017 286

private institutions of higher education are "managerial employees", where their recommendations are normally determinative of curricular matters. This decision represents a reversal of the position taken by the NLRB since 1971 and potentially is an invitation to endless litigation, absent a congressional resolution of the substantive issue.

Since the Feb. 20th Yeshiva decision, the university administration at Villanova, which earlier had agreed to forego N.L.R.B. hearings and hold a union-representation election, has changed its mind on the grounds that under Yeshiva its faculty are not entitled to bargain collectively under the NLRA, and the University of New Haven has terminated contract negotiations with the faculty union.[3] Further, the majority opinion articulates a test for the rationality of the NLRB's decisions determining when faculty employees are to be considered managerial or not.

INTRODUCTORY BACKGROUND

The National Labor Relations Board (NLRB) first asserted jurisdiction over non-profit, private independent institutions of higher education in the Cor-

---

condition to bargaining is indeed lacking." Carr and VanEyck, op. cit., p. 21.

3The Chronicle of Higher Education, March 17, 1980, p. 2.

4Cornell University, 183 NLRB No. 41, 1970 CCH NLRB 28, 309-2.

> The case was unusual in several ways. For one thing, the petition to the NLRB to conduct a representation election among these employees came, not from the workers, but from Cornell University as the employer. For another, the bargaining between Cornell University and its employees could have taken shape under state law, since New York is one of the few states with a little Wagner Act applicable to private educational institutions....
>
> Why did Cornell...turn to the NLRB, asking it to reverse its 1951 ruling in the Columbia University Case and bring private educational institutions under its jurisdiction? Recognizing that it was going to have to bargain with certain of their employees under state law in any event, Cornell preferred to go forward under federal law in the belief that this course offered certain advantages, the principal one being that federal law prohibited unfair labor practices on the part of unions as well as employees, whereas the New York statute placed such restraints only on employers.
>
> ...there is no indication...that anyone recognized the way was

nell case (1970)[4] and thereby reversed its earlier decision in the Columbia case (1950).[5] Cornell involved the unionization of non-academic employees. C. W. Post (1971)[6] was the first case in which the NLRB decided the question whether faculty were eligible under the National Labor Relations Act (NLRA) for inclusion in a collective bargaining unit. The first judicial confirmation of the NLRB's position affirming the right of faculty at private institutions to organize under the NLRA for purposes of collective bargaining was the 1st Circuit's decision in Wentworth.[7] On July 31, 1978, the 2nd Circuit's decision in Yeshiva[8] dramatically challenged the position taken by the NLRB

---

being opened to collective bargaining under NLRB supervision by faculty members as "employees" of private institutions....no indication that any one of these institutions was giving thought to the possibility that it might one day be asked to bargain with its faculty... Carr, Robert K., and Van Eyck, Daniel K., Collective Bargaining Comes to the Campus, American Council on Education, Washington, D.C., 1973, pp 25-26.

5Columbia, 97 NLRB 424 (1951). In Columbia, the threshold question was whether the NLRB should assert jurisdiction over non-profit, private colleges. The Board decided that it would not "assert its jurisdiction over a nonprofit, educational institution where the activities involved are noncommercial in nature and intimately connected with charitable and educational activities of the institution." (At 427). The Board declined jurisdiction over clerical employees of the Columbia University libraries.

6C.W. Post Center, 189 NLRB No. 109, 77 LRRM 1001 (1971).

"In the first faculty case to be presented, C.W. Post Center, the administration raised only tangentially the question of the faculty's status under the Act. It had argued that the Board's extension of jurisdiction in that case should await the issuance of guidelines concerning the size of the institution requisite for federal coverage. To the extent it touched exemption, its treatment, based on distinguishing the facts in Cornell, urged the exclusion of all professional employees. Thus, in what must be considered dictum, the Board reached beyond the specific arguments, perhaps in contemplation of future such challenges:

> 'Mindful that we are to some extent entering into an unchartered area, we are of the view that the policy-making and quasi-supervisory authority which adheres to full-time faculty statues but is exercised by them only as a group does not make them supervisors...or managerial employees...'

Finkin, M., "The NLRB in Higher Education," University of Toledo Law Review, Vol. 5, No. 3, Spring 1974, pp 609 to 655, at pp 612-13.

7NLRP v. Wentworth Institute, 515 F.2d 550 (1st Circuit 1975).

8NLRB v. Yeshiva University, 582 F. 2d 686 (2nd Circuit 1978).

since C.W. Post. While the 2nd Circuit's Yeshiva decision can be reconciled with the 1st Circuit's Wentworth decision because of each circuit's deliberate restriction of its own decision to the facts of the situation before it,[9] nonetheless, conceptually the 2nd Circuit's Yeshiva opinion totally rejected the rationale used by the NLRB to justify the inclusion of faculty at private institutions of higher education within the protective coverage of the NLRA.

The 2nd Circuit was of the opinion that the NLRB had summarily decided the issue without any analysis "simply by stating that the substantial author-

---

9NLRB v. Wentworth Institute, supra: "We do not take Wentworth's views lightly, and were we a legislature we might reach a different result. But we are unable to convince ourselves that all faculties of all private non-profit institutions of higher learning in the nation are so situated as to fall outside the ranks of 'employees' under the Act. Given wide differences in terms of service and responsibility, the focus must be upon each particular institution." (At p.556) "In (restating the Board's finding that the faculty members included in the Wentworth unit were not managerial employees), we do not comment on the Board's developing views on the significance of a substantial faculty role in decisions on curricula, admissions, hiring, degree requirements, and other educational policy matters. Neither do we suggest that faculty members with different relationship and status than those herein are necessarily included employees under the Act." (At pp 557-58).

And NLRB v. Yeshiva University (2nd Circuit, 1978), supra:

> Although the Board has, on a number of occasions, considered the question whether full-time faculty at a mature university are supervisors or managers under the Act, no court of appeals has squarely determined the issue. In NLRB v. Wentworth Institute..., the First Circuit simply rejected the Institute's argument that at Wentworth there was "no evidence of an instance of significant faculty impact collectively or individually on policy or managerial matters." (Footnote 9, at p. 695)

The 2nd Circuit's construction of Wentworth is that it stands not for the proposition that all faculties at all private, non-profit institutions of higher education have rights under the NLRA but that faculties that have no substantial authority and no significant impact have rights under the NLRA.

> Given the great diversity in governance structure and allocation of power at such universities, it is appropriate to address ourselves solely to the situation at the institution involved in this proceeding. (Ibid. (At p. 696).

Wentworth judicially confirmed the NLRB's position that a non-profit, private institution of higher education is an "employer" under the NLRA, s. 2 (2), 29 U.S.C. s. 152(2). The NLRB had decided to exercise its discretionary jurisdiction over these employers in Cornell (1970) because of the significant change in impact they had had on interstate commerce since Columbia (1951) twenty years earlier. The Board set the jurisdictional standard for cases coming from private institutions at an annual gross operating revenue of at

ity of the faculty was wielded in their capacity as professionals and by invoking three doctrines promulgated in earlier board rulings."[10]

The NLRB's first contention was that the full-time faculty are professional employees under section 2(12) of the NLRA, 29 U.S.C. s. 152(12).[11] The 2nd Circuit asserted that on the basis of the Board's own prior decisions "the fact that employees are professional does not preclude them from also being categorized as supervisory or managerial employees ineligible for inclusion in a bargaining unit."[12] The Court then distinguished the individual professor's exercise of discretion as a professional in conducting the courses he is employed to teach from the extensive control of the faculty over all curricular and faculty status matters as managerial or supervisory.

> Unquestionably, a university full-time faculty member has the authority to determine the content of his course, the method he employs in teaching it, and the evaluation of his students' academic performance....these attributes of professionalism should not characterize the faculty as managerial or supervisory.
>
> However, the issue as we perceive it in this case in-

---

least one million and annual out-of-state transactions of at least fifty thousand (35 Fed. Reg. 18370, Dec. 3, 1970).

10Ibid, p. 696.

11Section 2(12) of the Act defines a professional employee as

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (12) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

12NLRB v. Yeshiva University, supra, p. 697.

> volves not simply the professor's exercise of discretion in conducting the courses he is employed to teach. Rather the issue here is the extensive control of Yeshiva's faculty over what courses are taught in the institution, who teaches them, the number of teaching hours required of the faculty, and the rank, salary, and tenure status of other faculty members. We are further concerned by the crucial role of the full-time faculty in determining other central policies of the institution including inter alia, the curriculum, admissions and graduation requirements, tuition, and in one instance, ever the sites of a school. When faculty members have such power... they no longer are simply exercising individual professional expertise. They are, in effect, substantially and pervasively operating the enterprise.
>
> ...We cannot reasonably equate the inmput of professionals in a profit-making commercial enterprise, whose advice based on their "technical expertise" may influence management on occasion to implement policy changes, with that of the full-time university faculty, which is here largely responsible for the conduct and direction of an institution of higher education. This is not the case of a company which hires an occasional scholar to guide it in making engineering, legal, or accounting decisions which have an impact on its business; this is the "company of scholars" itself.[13]

The NRLB's second contention was that "since the faculty's supervisory and managerial functions are exercised 'on a collective basis' rather than by individual faculty members, they must be denied status as supervisory or managerial personnel."[14] The 2nd Circuit rejected the NLRB's 'collective exercise' doctrine for three reasons. First, the Board had never adequately explained this rationale in this or in its prior decisions.[15] Secondly, the

---

13Ibid, p. 698.
14Ibid.
15Ibid.
When the Board first announced this view in C.W. Post Center of Long Island University, supra, at 905, it did so without benefit of analysis and without citation to pertinent administrative decisions, judicial precedents, or legislative history, In Fordham University, supra, the Board repeated its conclusory approach to the problem. Finally, in Adelphi University, supra, the Board conceded that its position arose not from precedent but from its puzzlement in attempting to apply to the unique university governance stricture terms "designed to cope in the typical organizations of the commercial world." Id. at 648. The Board admitted that it could not square the Act with

court rejected a literal construction of Section 2(11)[16] restricting its application exclusively to "an individual," on the grounds (1) that "in other holdings by the Board...the collective exercise of authority was not grounds for exclusion from supervisory status,"[17] (b) that "the legislative history... indicates that such collective supervision simply was not actively considered by Congress at that time,"[18] and (c) a literal reading is unrealistic "since group action is so frequently encountered in modern corporate decision mak-

---

the university setting in which "power and authority is vested in a body composed of all of one's peers or colleagues." ... In two subsequent decisions, Northeastern University, supra, and Miami University, supra, the Board refused to further analyze or reconsider the issue of the supervisory or managerial status of full-time faculty. Instead, it dismissed the question, as it did in this case, solely by reference to its earlier rulings. Ibid, footnote 14.

In Adelphi, 195 NLRB at 648, the Board said:

> The difficulty both here and in Post may have potentially deep roots, stemming from the fact that the concept of collegiality, wherein power and authority is vested in a body composed of all of one's peers or colleagues, does not square with the traditional authority structures with which this Act was designed to cope in the typical organizations of the commerical world. The statutory concept of "supervisor" grows out of the fact that in those organizations authority is normally delegated from the top of the organizational pyramid in bits and pieces to individual managers and supervisors who in turn direct the work of the larger number of employees at the base of the pyramid.
>
> Because authority vested in one's peers, acting as a group, simply would not conform to the pattern for which the supervisory exclusion of our Act was designed, a genuine system of collegiality would tend to confound us.

16Section 2(11) of the Act defines a Supervisory as

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, or to effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

"...the requirements have been read disjunctively. Thus, the mere possession of authority for any one item in the definition will result in a finding of supervisory status. Some requirements, however, are conjunctive: (1) that the individual has authority; (2) to use independent judgment; (3) in performing any one of the listed functions; (4) in the interest of management." Finkin, op. cit., p. 619.

17Ibid, p. 699.

18Ibid.

BEST COPY AVAILABLE

ing."[19] Thirdly, the court saw no need to resolve the issue of the construction of Section 2(11), "since there is no such 'individual' statutory restriction in the Board's own concept of 'managerial employees'."[20]

Thirdly, the NLRB contended that the faculty acts on their own behalf and not in the interest of the employer. The 2nd Circuit rejected this doctrine as conclusory and unsupported by facts in the record and by anything substantive in the Board's reasoning.[21]

> ...the fact that the administration and Board of Trustees of Yeshiva so rarely interfered in the faculty decisions indicates that the interests of the faculty and of the University were almost always co-extensive....the full-time faculty...have not in fact acted simply in an advisory capacity or have they merely made recommendations which were accorded substantial weight; their decisions on major policy issues have, for the most part, proved definitive.-[22]
>
> ....In fact, a realistic assessment of the way in which a university such as Yeshiva functions demonstrates the in-

---

19Ibid

20Ibid.

In fact, in NLRB v Bell Aerospace Co., supra, the managerial personnel found not to be within the collective bargaining unit exercised their managerial functions as a "team." Id. 416 U.S. at 260, 94 S.Ct. 1757. Logically, we see no reason that the fact that the policies of a company are created by a group (as indeed they usually are by the Board of Directors) rather than by an individual should be of significance in determining whether an individual has managerial status, and the Board has advanced no satisfactory rationale for the weight it has given this factor. Ibid, pp 699-700.

Managerial employees are exempted from coverage of the Act not by explicit statutory language but as a matter of Board policy and unanimous court approval. NLRB v. Bell Aerospace, 416 U.S. 267, 285-89 (1974). Employees who fall within this category include "those who formulate, determine, and effectuate an employer's policies." Ibid, p. 695.

"Unlike supervisors, the exemption of managerial employees is not explicitly provided in the Act. Thus the Board and the courts have fashioned verbal formulations lacking the precision of the statute's supervisory definitions....Two related tests of managerial status have received judicial approval: such status is accorded to those who are closely aligned with management whose inclusion in a bargaining unit would create a conflict of interest with rank-and-file workers: and those who formulate, determine, and effectuate the employer's policies....Finkin, op. cit., pp 614-15.

21Ibid, p. 700

22Ibid.

> applicability of the "interest of the faculty' analysis in such a context...[23]

The fourth NLRB contention that the faculty is not managerial or supervisory because it is subject to the ultimate authority of the Board of Trustees was rejected as "particularly unconvincing."[24]

> Normally, every corporation is ultimately operated by its Board of Directors, and yet that fact obviously has never precluded a finding that there are managerial or supervisory employees in the corporation. Certainly the President and Vice-Presidents of Yeshiva as well as its Deans are subject to the ultimate authority of the Board of Trustees and yet this does not prevent them from holding managerial or supervisory status.
>
> Section 2(11), in defining a supervisory, expressly includes those who have the power "effectively to recommend" any of the enumerated actions. Obviously then, the section contemplates a review by some higher authority.[25]

Finally, the NLRB urged that its factual findings as to employee status are entitled to great weight and not lightly to be set aside.

> ...a Board determination...will stand if it has warrant in the record and a reasonable basis in the statute. However, with respect to the status of full-time faculty the Board here has made no factual findings which would preclude supervisory or managerial status, nor has the Board advanced any persuasive rationale for refusing to so categorize Yeshiva's faculty.[26]

23Ibid. The 2nd Circuit's own "realistic assessment" of the way in which a university functions was based (a) on Kahn, "The NLRB and Higher Education: The Failure of Policymaking Through Adjudication," 21 U.C.L.A. Law Review 63 (1973), in which Kahn argues that "in higher education there is no sharp dividing line between the employer and the employee" (At p.68) and "that the university is, ideally, a professional community in which common educational interests supersede all potential divisions between the faculty and the university"(Ibid); and (b) on the 1966 "Statement on Governance of Colleges and Universities (52 AAUP Bulletin 375, 1966) jointly formulated and approved by the AAUP, the ACE, and the Association of Governing Boards of Universities and Colleges, which asserted the principle of shared authority among the Board of Trustees, the administration, and the faculty: "these three components have the joint authority and responsibility for governing the institution and the essential and overriding idea is that the enterprise is joint..."

24Ibid, p. 701.

25Ibid, p. 701-02.

26Ibid, p. 702.

Further, the court referred to the legislative history:

> It is clear that the Congress, when it amended the Act in 1947, had no contemplation that it would be applied to professional faculties in private institutions of higher education. Their governance is unique and has no counterpart in the commercial business models that Act was designed to regulate.[27]

THE SUPREME COURT DECISION

Yeshiva is a case of statutory construction of the NLRA. One major difference between the majority (Powell) and minority (Brennan) opinions is the issue of the deference due to the NLRB's decision. The majority and the 2nd Circuit are of the opinion that the NLRB had not done its "homework." The other and substantive issue is the characterization of college faculty status under the NLRA. Both the 2nd Circuit and the Supreme Court decided that substantive issue in terms of the board-created and judicially implied category of "managerial employees." While the 2nd Circuit's opinion includes a lengthy discussion of the statutory category of "supervisory employee," the Supreme Court deliberately prescinded from discussing and applying the category of "supervisory employee."[28]

27Ibid.

28Both the majority and minority restricted their analyses to the faculty's role concerning curricular matters and did not analyze the faculty's role concerning faculty status matters (i.e. recommendations regarding the appointment, re-appointment, promotion, and tenure of faculty colleagues). The court seems to be distinguishing these two roles and logically relating curricular matters to the category of "managerial employee" and faculty status matters to that of "supervisory employee." As a result, the issue of "supervisory employee" status has not been decided. Also the Supreme Court did not discuss nor decide the issue of whether this statutory category should be interpreted literally in an individualistic sense or a collective sense, an issue discussed by the 2nd Circuit.

"The record shows that faculty members at Yeshiva also play a predominant role in faculty hiring, tenure, sabbaticals, termination and promotion....These decisions clearly have both managerial and supervisory characteristics. Since we do not reach the question of supervisory status, we need not rely primarily on these features of faculty authority." (Majority Opinion, fn. 23).

"The Tension"

Both the majority and minority acknowledge that there is a tension created by the NLRA's inclusion of professional employees and exclusion of managerial employees. In whose favor is the tension to be resolved and by whom and on what basis? While both the majority and minority seem to agree that Congress intended the NLRB to exercise its discretionary authority based on its evolving expertise to resolve this tension in particular instances and that judicial review of NLRB decisions should be restricted to their rationality and consistancy with the Act, in Yeshiva the majority criticize the NLRB for failing to make a factual analysis and for relying on conclusory rationales.[29]

On the substantive issue, the majority acknowledges that full-time college faculty, as individual instructors, who teach courses assigned to them, evaluate the academic performance of their students, and conduct research, are professional employees and accordingly under s.2(12) of the NLRA entitled to collective bargaining rights.[30] But when the individual professor leaves his

---

" Because the Court concludes that Yeshiva's full-time faculty are managerial employees, it finds it unnecessary to reach the University's contention that the faculty are also excluded as "supervisors" under s.2(11). My discussion therefore focuses on the question of the faculty's managerial status, but I would resolve the issue of their supervisory status in a similar fashion. "
(Minority Opinion, fn. 2)

29Ibid, p. 4180.

30Ibid, fn. 31.

" It is plain. . . that professors may not be excluded merely because they determine the content of their own courses, evaluate their own students, and supervise their own research. There thus may be institutions of higher learning unlike Yeshiva where the faculty are entirely or predominantly nonmanagerial. There also may be faculty members at Yeshiva and like universities who properly could be included in a bargaining unit. It may be that a rational line could be drawn between tenured and untenured faculty members, depending upon how a faculty is structured and operates. But we express no opinion on these questions, for it is clear that the unit approved by the Board was far too broad. "

Apparently, Wentworth Institute (supra) is an example of an institution of higher education where full-time faculty are "merely professional" since they only teach courses, evaluate students' academic performance, and conduct

classroom or his office to meet with his colleagues at the program, department, college, or university-wide level, to discuss and make normally determinative curricular recommendations, he ceases to be "merely professional" and becomes a member of a managerial group, no longer entitled to NLRA protection. The majority resolves this "tension" (inclusion v. exclusion) between these two responsibilities discharged by one and the same individual faculty member in favor of exclusion from NLRB coverage.[31] even though the average full-time faculty member spends at most twenty to forty percent of his time with his colleagues on wider curricular matters.

"Two Conjunctive Principal Reasons"

The majority defines full-time faculty as managerial employees because of two reasons considered conjunctively: the nature of the decision coupled with the extent of the authority exercised. Is the decision a management decision? and is the employee's recommendation normally determinative?

The majority relies on an analogy with the business world. To decide the curriculum is to decide the "academic product" and to decide admission and retention standards is to decide the "academic market." Product and Market decisions are properly management decisions and not rank-and-file labor decisions. Secondly, where the faculty's recommendations regarding the "academic

---

their own individual research. A line can be drawn between tenured and non-tenured faculty by restricting one or the other of these two groups to "merely professional" responsibilities, but no self-respecting faculty, especially those who support AAUP Standards and Guidelines, would accept such a division within the faculty.

31Faculty do not characterize nor would accept a characterization of their role in these terms: the defined individual responsibilities as merely professional and the defined collective responsibilities as managerial. Most faculties would consider any restriction of their activities to the "merely professional" as creative of a "semi-professional" status, i.e. they are not being allowed to exercise the full scope of their professional responsibilities, to be fully professional. Faculties probably read this decision as saying the "semi-professional" faculties have a statutory right, but "fully professional" faculties do not.

product" and the "academic market" are normally determinative, then their authority is decisive.

> The controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial. Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these. To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served.[32]

"Other Majority Reasons"

1. The need for the right to bargain collectively, given the present and reasonably forseeable dismal economic situation of full-time faculty at private institutions of higher education, is an issue for congressional legislation and not for judicial action.[33]

This is the classic and legitimate response of a philosophy of judicial restraint. The irony is that the majority did reach the substantive issue and substitute its own determination of a rational resolution of "the tension" rather than remand the case to the NLRB for a factual analysis adequate to supporting a rational resolution. One can argue that the stance of judicial restraint requires recognizing that Congress' basic intent in creating the NLRB was for the agency to exercise its discretionary judgment as long as it was rational, i.e. based upon factual findings and a factual analysis. The Court in Yeshiva not only resolves "the tension" in this instance but is in effect informing the NLRB that the test for rationality when it resolves in

---

32Ibid, p. 4179.
33Ibid, fn. 29, p. 4180.

the future "the tension" is the nature of the decision (i.e. is the decision in question properly a management function?) coupled with the extent of the authority exercised (are the recommendations normally determinative?).

2. The fact that full-time faculty have a specific economic interest (viz., wages and fringe benefits) potentially adverse to that of the institution as a whole or to that of competing priorities within the institution is irrelevant, since legitimately excluded managerial employees anywhere have the same adverse interest.[34]

3. The "independent professional judgment" asserted by the NLRB is asserted here on appeal for the first time without any prior authoritative board precedents or applications. Further,

> Since the Board does not suggest that the "independent professional judgment" test is to be limited to university faculty, its new approach . . . could result in the indiscriminate recharacterization as covered employees of professionals working in supervisory and managerial capacities.[35]

4. To allow a full-time faculty to be included under NLRA coverage would create the danger of divided loyalties which the Act's exclusionary categories exist to avoid.[36]

5. In the context of higher education, it is fruitless to discuss or insist on a distinction between "in their own interest" and "the interest of the employee."[37]

"Minority's Position"

Brennan's dissenting opinion stresses the uniqueness of the faculty's role in the governance structure of an institution of higher education and the difference between the academy and industry. While it may be accurate to say

---

34Ibid, fn. 27, p. 4179.
35Ibid, p. 4179
36Ibid.
37Ibid.

that product and market decisions are a management function in an industrial or business context and that employees who effectively recommend such decisions are to be excluded from NLRB coverage as managerial employees, full-time faculty whose curricular recommendations are normally determinative are not to be considered managerial because they exercise "independent professional judgment."[38]

To understand the logic of the minority's argument, one must first understand the basic reason for the statutory exclusion of supervisory employees and the Board-created, judicially implied exclusion of managerial employees. To allow supervisory employees and/or managerial employees to be included in a collective bargaining unit or even to be organized in a separate union would create the danger of divided loyalties threatening either the integrity of the union or that of management or both. Presumably, an employee's union membership could influence, at least subtly, his recommendations concerning product and market decisions because of the implications of those decisions for his union colleagues. Conversely, the loyalty of a managerial employee to management could weaken the union's strength.[39]

Since the faculty's curricular recommendations are made on the basis of its independent professional judgment, no danger of divided loylaty arises; therefore, there is no need to apply the exclusionary categories; therefore, the resolution of "the tension" is a matter for the exercise of the NLRB's discretionary authority, so long as its decision is rational and consistent with the NLRA.

Why doesn't the exercise of independent professional judgment create the danger of divided loyalty? Because curricular recommendations (a) are based on academic standards, (b) are an exercise of academic freedom, (c) are not

---

38Ibid, p. 4181.
39Ibid.

made from the administration's peculiar perspective, (d) are not accountable to the administration, and (3) are finally only recommendations binding on no one until and only when a decision is made by the administration and/or the governing board. When the faculty makes curricular recommendations, it is exercising its full, independent professional responsibility, is not accountable to management for those recommendations, and is not acting as a true representative of management. Because faculty is acting independently, they are not aligned with management.

> The premise of a finding of managerial status is a determination that the excluded employee is acting on behalf of management and is answerable to a higher authority in the exercise of his responsibilities. The Board has consistently implemented this requirement-both for professional and non-professional employees-by conferring managerial status only upon those employees "whose interests are closely aligned with management as true representatives of management." (Emphasis added.) E.g., Sutter Community Hospitals of Sacramento, 227 N.L.R.B. 181, 193(1976); Bell Aerospace, 219 N.L.R.B. 384, 385 (1975); General Dynamics Corp., 213 N.L.R.B. 851, 857 (1974). Only if the employee is expected to conform to management policies and is judged by his effectiveness in executing those policies does the danger of divided loyalties exist.[40]

> ...Although the administration may look to the faculty for advice on matters of professional and academic concern, the faculty offers its recommendations in order to serve its own independent interest in creating the most effective environment for learning, teaching, and scholarship. And while the administration may attempt to defer to the faculty's competence whenever possible, it must and does apply its own distinct perspective to those recommendations, a perspective that is based on fiscal and other managerial policies which the faculty has no part in developing. The University always retains the ultimate decisionmaking authority, . . . and the administration gives what weight and import to the faculty's collective judgment as it chooses and deems consistent with its own perception of the institution's needs and objectives.[41]

40Ibid, p. 4182.
41Ibid.

COMMENT

How do the majority and the minority characterize the faculty role?

The majority view the faculty members as simultaneously both an individual professional and a managerial employee, i.e. a contributing member to a collective process and group that effectively recommends or decides academic "product" and academic "market," the policies most central to any academic enterprise. The subject matter of their collective decisions is managerial; their authority is normally decisive.

The minority considers the majority's characterization "an idealized model, . . . a vestige of the great medieval university."[42] The majority's understanding of the realities of the faculty role is "distorted by the rose-colored lens through which it views the governance structures of the modern-day university."[43] Instead, "one must be careful not to overvalue the significance of the faculty's influence on academic affairs." The minority quotes with approval Board Member Kennedy's 1975 opinion in Northeastern University (218 N.L.R.B. 247, 257): ". . . university administrators rarely consider themselves bound by faculty recommendations."[45] It quotes with approval K. Mortimer and T. McDonnell: "Even the concept of 'shared authority'. . . has been found to be 'an ideal rather than a widely adopted practice'."[46] It quotes the Carnegie Commission on Higher Education's 1973 Report on The Governance of Higher Education: "faculty members should have the right to organize and to bargain collectively, if they so desire."[47] ". . . unionization for faculty is more a protective than an aggressive act."[48]

42Ibid, p. 4183.
43Ibid.
44Ibid, fn. 8, p. 4182.
45Ibid, p. 4183.
46Ibid, fn. 14.
47Ibid, fn. 17.
48Ibid.

> The upsurge in the incidence of collective bargaining has generally been attributed to the faculty's desire to use the process as a countervailing force against increased administrative power and to ensure that the ideals of the academic community are actually practiced.[49]

The Supreme Court presents two sharply conflicting characterizations. On the one hand, we have a faculty in control of curricular policies with rare dissent from the administration; on the other hand, an increasingly impotent faculty trying to organize to insure that academic ideals are actually practiced while administrators "rarely consider themselves bound by faculty recommendations" and make decisions simply on a fiscal basis. The fact that the court divided 5 to 4 suggests that both views caricature both faculty and administration.

The majority's opinion seems to stand for the proposition that where the faculty normally controls curricular matters, it has no statutory right to bargain collectively. After all, it is in control and can insure that the ideals of the academic community are actually practiced. Conversely, where the full-time faculty simply teach their courses, evaluate their students, conduct their own research, and do not normally control wider curricular matters, they have a statutory right to bargain collectively. For then, they are individually professionals, but "rank and file" professionals, "employees whose decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned."[50] The majority opinion sees full professionalization as a bar to the statutory right to collective bargaining. The minority does not consider full professionalization as a bar to the statutory right to bargain collectively, because collective faculty curricular determinators are finally independent and only recommendatory and advisory.

49Ibid.
50Ibid, p. 4178.

Being fully professional precludes the statutory right. Congress intended collective bargaining only for the semi-professional faculty member. This decision creates a cruel dilemma for faculty and for the AAUP. Unless Congress explicitly includes college faculty, college faculty must choose between being semi-professional with a statutory collective bargaining right or being fully professional without that right. The AAUP must choose between continuing its historic insistance on full faculty professionalism or to be a labor organization for semi-professional faculties.

Finally, another troubling aspect of the opinion is that it does not even address the "fact" that the average, typical faculty member probably spends far less than twenty per cent of his or her time as a managerial employee as defined by the majority. Yet the majority resolves "the tension" between 80% of the faculty's role as professional employees versus 20% of the faculty's role as managerial employees in favor of exclusion and does so without giving a reason for resolving the tension this way. If a minor part of the faculty's responsibilities are managerial, then despite the protected status of the majority of responsibilities, the faculty has no statutory right.

John Andrew Gray
Loyola College
Baltimore, Maryland
March 1980